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# Wisconsin Legislative Council

## INFORMATION MEMORANDUM

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IM-2021-13

### BEER AND LIQUOR WHOLESALERS

Wholesalers (or distributors) are the middle, or second tier, in Wisconsin's three-tier structure for regulating the alcohol beverages industry. As part of that structure, state law generally requires that alcohol beverages be distributed by an authorized wholesaler before they may be sold by a retailer to consumers, with certain exceptions. Fermented malt beverages (beer) must be distributed by a wholesaler holding a beer wholesaler's permit. Similarly, intoxicating liquor (liquor) must be distributed by a wholesaler holding a liquor wholesaler's permit.

Under this system, alcohol must flow from the manufacturer to the wholesaler and then to the retailer before it may be purchased by the consumer. Commonly referred to as the "three-tier system," it was first developed after Prohibition and is premised on the idea that separating the manufacture, distribution, and retail sale of alcohol reduces problems such as bootlegging, retailers owned or controlled by breweries (known as "tied houses"), and the incentive to over-serve consumers.<sup>1</sup>

A wholesaler is a person, other than a brewer, brewpub, manufacturer, rectifier, winery, or out-of-state shipper, who sells alcohol beverages to a retailer or another licensed wholesaler. Once beer or liquor is manufactured, the brewer, brewpub, manufacturer, rectifier, winery, or out-of-state shipper<sup>2</sup> uses a wholesaler to advertise and distribute the beer or liquor for retail sale at a liquor store or tavern, unless a specific exception provides otherwise.

This information memorandum discusses state law regarding wholesalers and their interactions with the other tiers in Wisconsin's three-tier system. It does not discuss the Brand Compensation or Fair Dealership Laws, which provide wholesalers with certain rights regarding the brands of beer or liquor that they distribute and are discussed in a separate [Issue Brief](#).

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<sup>1</sup> For more information on the three-tier system, see Legislative Council, *Overview of Alcohol Beverages Regulations*, [Information Memorandum](#) (March 2021).

<sup>2</sup> An out-of-state shipper is a person who ships or delivers alcohol beverages into Wisconsin. Generally, the alcohol must be shipped or delivered to a wholesaler before it may be sold at retail. An out-of-state beer shipper may be an out-of-state brewer. An out-of-state liquor shipper may be a winery or manufacturer in another state, a wholesaler in another state, or an importer. [ss. [125.30](#) and [125.58](#), Stats.]

# WHOLESALE'S PERMIT

## Authorized Activities

With limited exceptions, it is illegal to distribute alcohol beverages without obtaining an appropriate wholesaler's permit. A beer wholesaler's permit authorizes the sale of beer only in original packages or containers to retailers or other wholesalers.<sup>3</sup> A liquor wholesaler's permit authorizes the sale of liquor to retailers and other wholesalers.<sup>4</sup> [ss. [125.04 \(1\)](#), [125.28 \(1\)](#), [125.32 \(6\) \(a\)](#), [125.33 \(9\)](#), and [125.54 \(1\)](#), Stats.]

Alcohol beverage manufacturers (such as brewers and wineries) generally may not sell their products directly to retailers. Instead, they must use a permitted wholesaler to distribute their products.

There are a few differences between the activities authorized by the two wholesaler's permits. A liquor wholesaler needs an additional permit to solicit future sales, while a beer wholesaler does not. Additionally, a liquor wholesaler has a good faith duty to negotiate with any liquor manufacturer, rectifier, or winery that seeks to sell its products through the wholesaler. This duty requires liquor wholesalers to work diligently to ensure that distribution channels are available for sale through the wholesaler to retailers. [ss. [125.28 \(1\) \(c\)](#), [125.54 \(8\)](#), and [125.65 \(1\)](#), Stats.]

## General Qualifications for Obtaining a Permit

A beer or liquor wholesaler's permit may be issued to any person who:

- Does not have an arrest or conviction record substantially related to the wholesaler's permit, or is not a habitual law offender of laws substantially related to the wholesaler's permit.
- Has been a Wisconsin resident for at least 90 days.
- Is of legal drinking age.
- Has submitted proof of a Wisconsin seller's permit under s. [77.61 \(11\)](#), Stats.
- Does not hold certain direct or indirect cross-tier interest restrictions, as discussed later in this information memorandum.
- Holds a Business Tax Registration (BTR) certificate.

[ss. [125.04 \(5\)](#), [125.28 \(2\)](#), [125.54 \(2\) and \(6\)](#), and [139.09](#), Stats.]

Applicants must submit an application form to the Department of Revenue (DOR) that includes the following information:

- The applicant's history as relevant to the applicant's fitness to hold a permit.
- The kind of permit for which the applicant is applying.
- The premises where alcohol beverages will be sold or stored.

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<sup>3</sup> A beer wholesaler may also continue to sell beer at retail to consumers if the wholesaler was issued a beer retail license prior to January 1, 2011. Prior to 2011 Wisconsin Act 32, a person could hold both a wholesaler's permit and retail license; Act 32 contained a grandfather provision to allow a person who held both the wholesaler permit and retail license to continue to engage in both activities directly under the wholesaler's permit. [s. [125.28 \(1\) \(e\)](#), Stats.]

<sup>4</sup> A liquor wholesaler also may sell to manufacturers, rectifiers, and wineries for production purposes. [s. [125.54 \(1\)](#), Stats.]

- The identity of any corporate officers and agent, if the applicant is a corporation.
- The identity of any company members or managers and of any company agent, if the applicant is a limited liability company.
- The identities of any cooperative members, board of directors, and agent, if the applicant is a cooperative.
- The applicant's trade name, if any.

[s. [125.04 \(3\) \(a\)](#), Stats.]

Finally, federal law requires wholesalers to obtain a basic permit from the Secretary of the Treasury, register with the Alcohol and Tobacco Tax and Trade Bureau (TTB), and provide TTB with certain information, such as the wholesaler's name and business.<sup>5</sup> [[26 U.S.C. s. 5124](#) and [27 U.S.C. s. 203 \(c\)](#).]

## Bona Fide Wholesaler

To maintain a permit, a wholesaler must be a "bona fide" wholesaler. Also, a wholesaler may only make "bona fide" sales to retailers.

To be considered a "bona fide" wholesaler, a beer wholesaler must sell and deliver beer to at least 25 retailers or other wholesalers each year, and a liquor wholesaler must sell and deliver liquor to at least 10 retailers each year. [ss. [125.28 \(5\) \(b\)](#) and [125.54 \(7\) \(a\) 2](#), Stats.]

Wholesalers must be "bona fide" and sell to a certain number of retailers each year.

The wholesalers and those retailers may not have any direct or indirect interest in each other or in the wholesaler. A wholesaler that does not meet the applicable retailer requirement may not have its permit renewed. To obtain a permit, a person must represent to DOR an intention to satisfy the requirement. [ss. [125.28 \(5\) \(b\)](#) and [125.54 \(7\) \(a\) 2](#), Stats.]

Regarding bona fide sales, a wholesaler may only **provide** alcohol beverages to retailers through a bona fide sale, paid either with cash or with short-term credit of up to 15 days for beer or up to 30 days for liquor. Similarly, a retailer may not **receive** beer or liquor on consignment<sup>6</sup> or any other basis other than a bona fide sale. A retailer also may not purchase or receive beer from a wholesaler if the retailer is indebted to a wholesaler for beer purchased or delivered more than 15 days earlier or for liquor purchased or delivered more than 30 days earlier. [ss. [125.33 \(7\) \(a\)](#) and [125.69 \(4\) \(a\)](#), Stats.] The bona fide sales requirements are intended to prevent wholesalers (and manufacturers) from acquiring control of a specific retailer by creating financial obligations for the retailer. [See 67 Op. Att'y Gen. 338 (1978) (quotation and internal citation omitted).]

## Permitted Premises

Wholesalers may only sell beer or liquor from their permitted premises, which must be described in the permit. A permit may not describe separate premises; a wholesaler must obtain a separate permit for each location or premises from which alcohol beverage deliveries are made

<sup>5</sup> For more information on applying for a federal basic permit, see the TTB's [website](#).

<sup>6</sup> While the Alcohol Beverages Chapter does not define what constitutes "consignment," consignment appears to refer to transactions in which a seller (e.g., wholesaler) gives alcohol to the retailer who pays the seller when the alcohol beverages are sold. The seller remains the owner (title holder) of the alcohol beverages until they are paid for in full and takes back the unsold goods after a certain point.

or at which alcohol beverages are stored. A beer wholesaler must maintain a warehouse on the licensed premises but may maintain many separate premises. However, a liquor wholesaler may only operate from two licensed premises, not including licensed public warehouses. [ss. [125.02 \(14m\)](#), [125.04 \(9\)](#), [125.28 \(3\)](#), [125.34 \(2\)](#), and [125.54 \(1\) and \(6\)](#), Stats.]

Because a wholesaler's permit applies only to a particular premises, a wholesaler may maintain an additional, separate warehouse to increase storage flexibility. To do so, the wholesaler must obtain an alcohol beverage warehouse permit, which authorizes the permit holder to store alcohol beverages in the warehouse premises covered by the permit, but not does authorize the sale of any alcohol beverages. [s. [125.19](#), Stats.]

## SALES MADE BY A WHOLESALER

### Permissible Purchases and Sales by a Wholesaler

Beer and liquor wholesalers may only purchase beer or liquor from the primary source of supply for a brand<sup>7</sup> or from another permitted wholesaler. Generally, only a beer wholesaler may distribute beer to a retailer for sale to consumers, and retailers must purchase beer from a beer wholesaler. Likewise, generally only a liquor wholesaler may distribute liquor to a retailer for sale to consumers, and retailers must purchase liquor from a liquor wholesaler. [ss. [125.33 \(9\) and \(13\)](#) and [125.69 \(5\) and \(6\)](#), Stats.]

Generally, brewers, brewpubs, and out-of-state beer shippers may not sell directly to retailers and may only sell, transport, or deliver beer to a beer wholesaler. However, some brewers and brewpubs are able to self-distribute to retailers if they so choose and if they comply with certain restrictions applicable to beer wholesalers. These brewers and brewpubs are sometimes referred to as "craft" brewers or brewpubs because of their smaller size. [ss. [125.29 \(3m\) \(a\)](#), [125.295 \(1\) \(f\) and \(g\)](#), [125.30 \(1\)](#), [125.33 \(9\)](#), and [125.34 \(6\)](#), Stats.]

Any alcohol beverages distributed by a wholesaler must be purchased from a "primary source of supply" for a brand, such as a brewer or winery, or from another permitted wholesaler. Retailers generally must purchase from a permitted wholesaler.

Brewers that manufacture 300,000 or fewer barrels of beer per year may self-distribute their beer to retailers without using a beer wholesaler. Brewpubs also have a limited ability to self-distribute, and may sell up to 1,000 barrels of beer per year directly to retailers. Similarly, a brewer that is an out-of-state shipper and manufactures 300,000 or fewer barrels of beer per year can sell and ship beer directly to retailers, if the brewer complies with certain requirements applicable to beer wholesalers.<sup>8</sup> [ss. [125.29 \(3m\) \(b\)](#), [125.295 \(1\) \(g\)](#), and [125.30 \(4\)](#), Stats.]

Likewise, manufacturers, rectifiers, wineries, common carriers, and out-of-state liquor shippers may only sell, transport, or deliver liquor to a liquor wholesaler. However, a direct wine shipper's permit allows a person to ship wine directly to a consumer without using a liquor

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<sup>7</sup> For beer, a wholesaler's primary source of supply is the brewer or brewpub that brewed the beer or the exclusive agent designated by the brewer or brewpub. For liquor, a primary source of supply is the manufacturer or rectifier or the exclusive agent designated by the manufacturer or rectifier. [s. [125.02 \(15\)](#), Stats.]

<sup>8</sup> An additional exception allows a beer wholesaler that holds a permit in both Wisconsin and Minnesota to distribute beer from a warehouse in Minnesota directly to retailers in Wisconsin without using a premises in Wisconsin. [s. [125.28 \(1\) \(b\)](#), Stats.]

wholesaler.<sup>9</sup> Any other shipment of alcohol beverages directly to a consumer is illegal. [ss. [125.52 \(1\) \(b\)](#), [125.53 \(1\)](#), [125.535](#), [125.54 \(1\)](#), and [125.68 \(10\)](#), Stats.]

State law requires that a beer or liquor wholesaler physically unload the alcohol beverages at the wholesaler's premises before they may be sold to a retailer. Then, the alcohol beverages may be loaded by the wholesaler and delivered to a retailer or to another permitted wholesaler.<sup>10</sup> A beer or liquor wholesaler may only make deliveries to the retailer, at the retail premises. [ss. [125.28 \(5\) \(a\)](#), [125.34 \(2\) and \(5\)](#), and [125.54 \(7\) \(a\) 1.](#), Stats.]

## Sales Areas and Exclusive Sales to Retailers

Beer and liquor wholesalers are subject to similar requirements to establish a sales area for each brand they sell to retailers, but the requirements differ as to whether the wholesaler must be the exclusive provider for a particular brand in that sales area.

A beer wholesaler must have a written agreement with a brewer, brewpub, or out-of-state shipper to sell, transport, or deliver a particular brand to a retailer. The agreement must be **exclusive** for that brand in a particular designated sales territory and must specify the wholesaler's designated sales territory for that brand, including the precise geographical area. Within that sales territory, the wholesaler must sell that brand to any retailer, and must charge the same price to all retailers who purchase in similar quantities. [ss. [125.33 \(6\) and \(11\)](#) and [125.34](#), Stats.]

A liquor wholesaler also must have a sales area for each brand sold. Within that sales area, a liquor wholesaler must charge the same price to all retailers that make purchases in similar quantities. Unlike with beer wholesalers, however, a liquor wholesaler's sales area need not be exclusive for a particular brand. In other words, only one beer wholesaler may sell a particular brand in a designated sales territory, while several liquor wholesalers may sell a particular brand in a sales territory. [ss. [125.54 \(5\)](#) and [125.69 \(3\)](#), Stats.]

Beer and liquor wholesalers must establish a sales area for each brand they distribute. For beer wholesalers, the agreement for a brand must be **exclusive** for that sales area.

Beer wholesalers may also sell some brands of beer exclusively to one Class "A" beer retail licensee (but not to a Class "B" beer retail licensee). A Class "A" beer retail license is most commonly used by a package store or convenience store and authorizes the sale of beer for consumption off the premises where sold ("off-premises" consumption), and in the original sealed package, container, or bottle. A Class "B" beer retail license is most commonly used by a bar, tavern, or restaurant and authorizes the sale of beer for either consumption on the premises where sold ("on-premises" consumption) or off-premises consumption. If a brand is produced by a brewer that produces less than 300,000 barrels of beer per year, a wholesaler may sell the brand exclusively to one Class "A" beer retail licensee. [ss. [125.25](#), [125.26](#), and [125.33 \(8\)](#), Stats.]

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<sup>9</sup> An out-of-state manufacturer or rectifier that holds an out-of-state shipper's permit may ship liquor directly to a Wisconsin wholesaler, manufacturer, rectifier, or winery; however, it may not ship liquor to a retailer or consumer. [s. [125.58](#), Stats.]

<sup>10</sup> The statutes specifically require that beer is unloaded at the wholesaler's premises and "physically at rest" before it is distributed to a retailer. [s. [125.34 \(2\)](#), Stats.]

## INTEREST RESTRICTIONS

### Tied-House Law

Wisconsin's "tied-house law" restricts the relationship between beer wholesalers and Class "B" beer retailers. There is no state tied-house law for liquor wholesalers. A tied-house is a brewery-owned or brewery-controlled bar or tavern and was common prior to Prohibition. By restricting the ability of a brewery (or wholesaler) to control a retailer, the Legislature intended to "assure the freest competition in the industry by preventing monopolistic practices and, to divorce entirely the wholesaler from the Class 'B' retailer." [*Miller Brands-Milwaukee, Inc. v. Case*, 156 Wis. 2d 800, 811 (Ct. App. 1990) (quoting 61 Op. Att'y Gen. 68, 69 (1972).]

Wisconsin's "tied-house" law generally prohibits a beer wholesaler from providing anything of value to a Class "B" beer retailer. However, the law allows for exceptions and does not apply to liquor wholesalers.

Wisconsin's "tied-house" law generally prohibits a beer wholesaler from providing anything "of value," such as furniture, equipment, or money, to a Class "B" beer licensee or permittee.<sup>11</sup> It also prohibits a wholesaler from requiring a Class "B" beer retailer to purchase beer from any particular brewer at the exclusion of those brewed by competitors. [s. [125.33\(1\)](#), Stats.]

However, the law allows for several exceptions. Specifically, a beer wholesaler may provide to a Class "B" beer licensee or permittee:

- Signs, clocks, or menu boards with an aggregate value of up to \$2,500.
- Beer tap handles.
- Signs made from paper, cardboard, plastic, or vinyl for placement inside the premises.
- "Usual and customary commercial credit" for beer industry products.

A beer wholesaler also may sell to a Class "B" beer permittee:

- Advertising matter, non-mechanical coolers, and tavern supply items, at fair market value.
- Equipment to preserve and maintain sanitary dispensing of beer, at fair market value.
- Dispensing equipment, such as beer storage boxes or tapping equipment, if sold at fair market value or maintained for fair consideration for cash or credit of up to two years.
- Consumable merchandise intended for resale.

Finally, a beer wholesaler may:

- Purchase advertising and other services and rights for a fair consideration from a corporate Class "B" licensee or permittee, if the Class "B" beer licensee or permittee is a professional sports team.
- Contribute money or other things of value to benefit certain nonprofits that conduct festivals.
- Contribute money or other things of value to or purchase advertising from an institution of higher education, if unrelated to the institution's sale of beer.

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<sup>11</sup> The law also applies to the relationship between a brewer or brewpub and a retailer.

- Purchase advertising for a fair consideration from a bona fide national or statewide trade association that derives its principal income from membership dues of Class “B” beer licensees.
- Purchase advertising from a person who does not hold an alcohol beverages license and who conducts sweepstakes, contests, or promotions on the premises of a Class “B” beer licensee or permittees that sell the wholesaler’s products.
- Conduct sweepstakes, contests, or promotions on the premises of Class “B” beer licensees or permittees who sell the wholesaler’s products.
- Purchase products from a Class “B” beer licensee or permittee.
- Provide reasonable business entertainment to a Class “B” beer licensee or permittee by providing tickets, food and beverages, and ground transportation for sports events or concerts, up to a \$500 value.
- Provide taste samples at a trade show, conference, convention, or business meeting of a retailer’s trade association held on retail premises.
- Provide taste samples at a beer-tasting event on retail premises, if the wholesaler charges a fee and the samples are provided by a brewer or brewpub or its representatives.

[s. [125.33](#), Stats.]

While liquor wholesalers are not subject to a state tied-house law, federal law prohibits certain anti-competitive practices by “industry members,” including beer and liquor wholesalers. The law prohibits these wholesalers from inducing retailers to purchase any products from the wholesaler to the exclusion of products from another wholesaler, if the inducement affects interstate or foreign commerce. More specifically, the federal law restricts the following activities:

- Acquiring or holding any interest in a retailer’s license.
- Acquiring any interest in real or personal property that is owned, occupied, or used by the retailer in the retailer’s business.
- Furnishing, giving, renting, lending, or selling to a retailer anything of value, with certain exceptions.
- Paying or crediting the retailer for any advertising, display, or distribution service.
- Guaranteeing any loan or the repayment of any financial obligation of the retailer.
- Extending to the retailer credit in excess of what is usual and customary for the industry.
- Requiring the retailer to take and dispose of a certain quota of alcohol beverages.

[[27 U.S.C. s. 205\(b\)](#).]

## **Cross-Tier Interest Restrictions**

Similar to the tied-house law, state statutes generally prohibit alcohol beverage licensees and permittees from holding cross-tier interests, to try to ensure that the three tiers remain separate.



The cross-tier interest restrictions prohibit a beer wholesaler or liquor wholesaler from having a direct or indirect interest in manufacturers or retailers. Specifically, with respect to beer, a beer wholesaler may not hold or have a direct or indirect ownership interest in a premises that holds any of the following permits:

Wholesalers may not hold certain direct or indirect cross-tier interests.

- Class “A” beer retail license (retailer that sells beer for off-site consumption, such as a liquor store).
- Class “B” beer retail license or permit (retailer that may sell beer for on-site consumption, such as a bar or restaurant).
- Industrial fermented malt beverages permit.
- Brewpub permit.
- Brewer’s permit.<sup>12</sup>

[s. [125.28 \(2\) \(b\)](#), Stats.]

Similarly, a liquor wholesaler generally may not hold a direct or indirect interest in any of the following:

- “Class A” liquor retail licensee (retailer that sells liquor for off-site consumption, such as a liquor store).
- A “Class B” liquor retail permittee (retailer may sell liquor for on-site consumption, such as a bar or restaurant).
- A “Class C” wine retail establishment (restaurant that serves only wine for on-site consumption).

Additionally, a manufacturer, rectifier, winery, or out-of-state shipper permittee may not hold an interest in a liquor wholesaler. [s. [125.69 \(1\)](#), Stats.]

DOR regulations provide a nonexhaustive list of impermissible direct and indirect interests in the liquor industry. Examples of direct interests include a person who holds a liquor wholesaler’s permit and leases premises to a retail licensee and a person who holds a liquor wholesaler’s permit and owns any equity in a partnership, association, or corporation that holds a retail license. Examples of indirect interests include a person who has “effective control” in a business that is operated under a liquor wholesaler’s permit and an immediate family member who resides in the same household and who has “effective control” in a business operated under a retail license. “Effective control” refers to the power to direct the affairs of the wholesaler or retailer or the actual direction of the affairs of the wholesaler or retailer. [[s. Tax 8.87, Wis. Adm. Code.](#)]

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<sup>12</sup> A wholesaler who held an ownership in a brewer prior to July 1, 2011, may continue to hold that interest. [s. [125.28 \(2\) \(d\)](#), Stats.]



## MINIMUM MARK-UP LAW

The Unfair Sales Act, also known as the minimum mark-up law, requires wholesalers to include a minimum markup in their sales to retailers. Selling alcohol beverages, or other products, below cost in order to attract sales is generally considered a form of deceptive advertising and an unfair method of commercial competition. Alcohol beverages sold by a wholesaler to a retailer must include a markup to cover a proportionate cost of doing business. State law presumes a minimum markup of three percent, unless there is proof of a lesser cost. [s. [100.30](#), Stats.]

The Department of Agriculture, Trade and Consumer Protection (DATCP) [website](#) contains additional information on the Unfair Sales Act and includes a complaint questionnaire.

This information memorandum was prepared by Tom Koss, Staff Attorney, and Melissa Schmidt, Senior Staff Attorney, on December 9, 2021.